UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

****

BOBBY LEN FRANKLIN; et al.,
Plaintiffs-Appellants,

v.

UNITED STATES, BUREAU OF LAND MANAGEMENT, et al.,
Defendants-Appellees.

No. 04-16698

D.C. No. CV-04-00128-RLH/PAL

NOTICE OF APPEAL*

To the SUPREME COURT OF THE UNITED STATES

DATED this 13th day of April, 2005.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2). Therefore, Appellants' motion for oral argument is denied.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BOBBY LEN FRANKLIN; et al.,
Plaintiffs-Appellants,

v.

UNITED STATES BUREAU OF LAND MANAGEMENT; et al.,
Defendants-Appellees.

No. 04-16698

D.C. No. CV-04-00128-RLH/PAL

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Robert L. Hunt, District Judge, Presiding
Submitted March 23, 2005**
Before: B. FLETCHER, TROTT, and PAEZ, Circuit Judges.
FILED and ENTERED **APR 04 2005**
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

2

Bobby Len Franklin, Robert Lee Franklin, and Donna Sue Owens appeal pro se from the district court's judgment dismissing their appeal from the Department of Interior Board of Land Appeals' decision affirming the Bureau of Land Management's denial of their application for Desert Land Entry under 42 U.S.C. § 321 et seq. Appellants also appeal the district court's order denying their motion for relief from judgment and their motion for trial by jury. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo the district court's determination that it lacked subject matter jurisdiction, see Botsford v. Blue Cross & Blue Shield of Montana, Inc., 314 F.3d 390, 392 (9th Cir. 2002), and for abuse of discretion its denial of a motion to reconsider, see Ayers v. City of Richmond, 895 F.2d 1267, 1269 (9th Cir. 1990).

We affirm for the reasons set forth in the district court's orders dated June 8, 2004 and July 30, 2004.

Appellants' remaining contentions are unpersuasive.

AFFIRMED.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

FRANKLIN, et al.,
Plaintiffs,
vs.
UNITED STATES, et al.,
Defendants.

No. CV-S-04-0128-RLH-(PAL)
Filed JUL 30, 2004; Entered AUG 2, 2004
ORDER* (Motion for Relief from Judgment or Order #21; Plaintiff's Motion and Demand for Trial by Jury #20)

Before the Court is Plaintiffs' **Motion for Relief from Judgment or Order** (#21), filed June 22, 2004. The Court has also considered Defendants' Opposition (#22), filed July 9, 2004, and Defendants' Reply (#23), filed July 21, 2004. Also before the Court is Plaintiffs' Motion and Demand for Trial by Jury (#20), filed June 22, 2004.

BACKGROUND

As stated in the Court's order of June 9, 2004, the facts in this case are as follows. This is an action in which Plaintiffs seek judicial review of an order of the Interior Board of Land Appeals ("IBLA"), issued December 19, 1996. In 1995, Plaintiff Bobby Len Franklin ("Franklin"), and his father, Plaintiff Robert Lee Franklin ("R. Franklin"), sent letters to Defendant Bureau of Land Management ("BLM") questioning the BLM's 1988 and subsequent 1993 denials of Franklin's request for Desert Land Entry ("DLE"). In response, the Las Vegas District Manager of the

BLM sent identical letters, dated October 27, 1995, to both men, with information pertaining to the mens' questions, and stating that the BLM was closing the Plaintiffs' files concerning the DLE application as no available appeals

procedures remain. Franklin and R. Franklin appealed those letters to the IBLA. The IBLA dismissed the Franklins' appeal on the grounds that the men were attempting to use the October 1995 informational letters to appeal the 1993 denial of Franklin's DLE application, a right Franklin had waived by neglecting to appeal the 1993 denial to the IBLA within 30 days of its issuance. Furthermore, the IBLA found that the letters themselves did not "adversely affect" the men within the meaning of 43 C.F.R. § 4.410(a), and therefore were not appealable. The two men, with Plaintiff Donna Sue Owens ("Owens") now seek judicial review of the IBLA's 1996 dismissal of their appeals from the 1995 informational letters.

The history of this perpetual case is extensive. On August 8, 1988, Franklin filed a DLE application with the BLM in an attempt to acquire title to an 80-acre parcel of land near Laughlin, Nevada (the site) from the U.S. government. On October 13, 1988, the BLM denied Franklin's application on the grounds that the property was not subject to disposition under the Desert Land Act because the land was **mineral in character**, and appropriated by mining claims. Franklin timely appealed to the IBLA, and in an order dated August 27, 1990, the IBLA **reversed** the decision and remanded the issue so that BLM could survey the land to determine whether the site was in fact mineral in nature and therefore whether it was subject to disposition.

Instead of **waiting** for the BLM's decision on remand, Franklin filed an action in Federal Court on May 6, 1991. This Court **dismissed** the action on August 20, 1991 for improper service of process, failure to exhaust administrative remedies under the Administrative Procedures Act, failure to name the United States as a proper defendant under the Federal Tort Claims Act, 28 U.S.C. §§2671, *et seq.*, and failure to provide defendants adequate notice regarding the facts that Franklin believed supported his complaint. Franklin appealed the **dismissal** to the Ninth Circuit, which affirmed on the service of process issue. *Franklin v. Clark*

County Manager's Office, et al., 967 F.2d 586 (9th Cir. 1992) (unpublished disposition). Subsequently, Franklin filed a Petition for Writ of Certiorari to the United States Supreme Court, which the Court denied. *Franklin v. Clark County Manager's Office*, et al., 508 U.S. 916 (1993).

BLM issued its decision on remand November 12, 1993, once again rejecting Franklin's DLE application. After survey and investigation, the BLM decided the property was in fact mineral in nature, and therefore not subject to disposition under the Desert Land Act. The decision set out Franklin's appeal rights, which were the same he had followed years earlier when he appealed the BLM's first rejection of his DLE application. Franklin had 30 days to appeal the decision to the IBLA. He did not do so.

Instead of appealing to the IBLA, Franklin filed another suit in Federal Court November 22, 1993, this time seeking to quiet title to the site. On May 16, 1994, this Court granted the United States' motion to for lack of subject matter jurisdiction, on the grounds that Franklin had failed to exhaust his administrative remedies by neglecting to file an appeal of the BLM's final decision with the IBLA.

Franklin appealed the District Court's dismissal to the Ninth Circuit, which again affirmed the dismissal. *Franklin v. United States*, 46 F.3d 1140 (9th Cir. 1995)(unpublished disposition). Again, Franklin filed a petition for Writ of Certiorari to the United States Supreme Court, which was again denied. *Franklin v. United States*, 516 U.S. 829 (1995).

In 1995, Franklin enclosed a portion of the site with a chain link fence and began occupying the site. The BLM advised Franklin that the use was unauthorized and requested that he leave. Franklin refused to do so. The United States instituted a trespass action against Franklin. Franklin counter-sued asserting that he owned the property. On October 14, 1997, this Court enjoined Franklin from any further trespass on the property. The District Court dismissed

Franklin's counter-claim for lack of subject matter jurisdiction for the same reason it had done so in 1994.

3

Later in 1997, Franklin filed yet another suit in Federal Court, which was again dismissed for lack of subject matter jurisdiction. Again, Franklin appealed to the Ninth Circuit, which again affirmed the District Court's dismissal. *Franklin v. Bilbray*, 172 F.3d 56 (9th Cir. 1999) (unpublished disposition). Franklin again filed a Petition for Writ of Certiorari to the United States Supreme Court, which was again denied. *Franklin v. Bilbray*, 528 U.S. 863 (1999).

In the instant action, Franklin joined with new Plaintiffs, R. Franklin and Owens, seeking this Court's review of issues arising from the rejection of Franklin's DLE application for the fifth time, this time seeking review of the IBLA's 1996 dismissal for lack of jurisdiction of Franklin and R. Franklin's appeal from the informational letters from BLM. On June 9, 2004, this Court dismissed the action on several grounds. Specifically, this Court lacks jurisdiction over the subject matter of these claims as Plaintiffs failed to exhaust their administrative remedies, the claims are time-barred by the applicable statute of limitations, and the claims are precluded under the doctrine of *res judicata*. Plaintiffs have now moved this Court for relief from the order dismissing Plaintiffs' claim. Plaintiffs have also moved for trial by jury. For the reasons established herein, Plaintiffs' motions are denied.

DISCUSSION

Plaintiffs have moved this Court for relief from its order of June 8, 2004, pursuant to Fed. R. Civ. P. 60(b). As a preliminary matter, because Plaintiffs appear *pro se*, the Court has construed their pleadings liberally. *See Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000).

Under Rule 60(b), a court may relieve a party from a final judgment, order or proceeding only for the following reasons: (1) mistake, inadvertence, surprise, or excusable

neglect; (2) newly discovered evidence; (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment is satisfied, released, or discharged, or a prior judgment on which it is based has been reversed; or (6) any other reason justifying relief from the judgment. A motion for reconsideration is properly denied when it presents no

arguments that were not already raised in the original motion. *See Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985).

Motions for reconsideration are not "the proper vehicles for rehashing old arguments," *Resolution Trust Corp. v. Holmes*, 846 F.Supp. 1310, 1316 (S.D.Tex. 1994) (footnotes omitted), and are not "intended to give an unhappy litigant one additional chance to sway the judge." *Durkin v. Taylor*, 444 F.Supp. 879, 889 (E.D.Va. 1977).

Here, Plaintiffs assert that they are entitled to relief from the Court's order pursuant to Rule 60(b)(3), (4), (5), and (6).

I. Fed. R. Civ. P. 60(b)(3)

Plaintiffs argue that they are entitled to relief from the Court's order, pursuant to Rule 60(b)(3), on the grounds that the Court's dismissal of Plaintiffs' claims was predicated upon a fraud perpetrated by Defendants. Plaintiffs argue that Defendants fraudulently represented to this Court that Plaintiff Franklin did not successfully appeal the BLM's determination that the land in question was, in fact, mineral in character. Defendants' representation was not fraudulent; it was true. Plaintiffs timely appealed to the IBLA the BLM's *first* determination that the land was mineral in character. The IBLA reversed the decision because the appropriate factual findings had not been made. The IBLA remanded the matter to the BLM to conduct the necessary investigation to determine whether the land was, in fact, mineral in character. The BLM issued its ruling on remand that the land was mineral in character. Plaintiffs never

appealed the BLM's determination on remand to the IBLA. Plaintiffs' failure to do so necessarily means that this Court lacks jurisdiction over the subject matter of Plaintiffs' claims.

In their instant motion, Plaintiffs rehash the fraud argument they have presented throughout this action. The Court addressed, in its prior order, that Defendants' arguments, with respect to Plaintiffs' failure to exhaust their administrative remedies, are true and correct. The Court will not continue trying to explain to Plaintiffs why Defendants' representation is not fraudulent.

5

Accordingly, Plaintiffs have not met the standard for relief from the Court's order pursuant to Rule 60(b)(3).

II. Fed. R. Civ. P. 60(b)(4)

Plaintiffs also contend that the Court's order of June 8, 2004, is void, and that Plaintiffs are therefore entitled to relief from the order, pursuant to Rule 60(b)(4). In support of this contention, Plaintiffs rehash the fraud argument discussed above, and argue that the six year statute of limitations applied by the Court is not valid in this case. The parties fully briefed these issues when the motion to dismiss was before the Court, and the Court fully addressed them in its previous order. The Court will not repeat itself here.

III. Fed. R. Civ. P. 60(b)(5)

Plaintiffs also contend that they are entitled to relief from the Court's order, pursuant to Rule 60(b)(5). Specifically, Plaintiffs argue that the Court's previous order was based upon a prior judgment that has been reversed. In support of this contention, Plaintiffs rely on their old standby argument, that the BLM's original denial of Plaintiff Franklin's application was reversed by the IBLA. For the reasons discussed *ad nauseum* throughout Plaintiffs' perpetual litigation concerning this matter, the Court's ruling was not based on a judgment that has been reversed. Accordingly,

Plaintiffs have not met the standard for relief from the Court's order, pursuant to Rule 60(b)(5).

IV. Fed. R. Civ. P. 60(b)(6)

Finally, Plaintiffs contend that they are entitled to relief from the Court's order, pursuant to Rule 60(b)(6). In support of this contention, Plaintiffs appear to argue that the Court committed prejudicial error by refusing to examine Plaintiffs' asserted property rights. As the Court has previously established, it cannot do so because it lacks jurisdiction over the subject matter of Plaintiffs' claims, the applicable statute of limitations has run, and the claims are precluded under the doctrine of *res judicata*. Plaintiffs have failed to establish a valid reason justifying relief from this Court's order of June 8, 2004, pursuant to Rule 60(b)(6).

6

V. Motion for Trial by Jury

As Plaintiffs' claims have been dismissed, there will not be a trial. Accordingly, Plaintiffs' motion is denied as moot.

VI. Sanctions

To the extent that Plaintiffs have requested sanctions in their motion for relief from judgment, the frivolous request is denied.

CONCLUSI N

Accordingly, and for good cause appearing,

IT IS HEREBY ORDERED that Plaintiffs' Motion for Relief from Judgment or Order (#21) is DENIED.

IT IS FURTHER ORDERED that Plaintiffs' Motion and Demand for Trial by Jury (#20) is DENIED.

IT IS FURTHER ORDERED that to the extent Plaintiffs have requested sanctions, the request is DENIED.

Dated: July 30, 2004.

s/ROGER L. HUNT
United States District Judge

7

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BOBBY LEN FRANKLIN, et al.,
Plaintiff,
vs.
UNITED STATES, et al.,
Respondent.

Filed **JUN 8, 2004**, Entered **JUN 9, 2004**
JUDGMENT IN A CIVIL CASE
CV-S-04-0128-RLH(PAL)

Decision by Court. This action came to be considered by the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDJED that this action is dismissed. Judgment is entered for the Defendants and against Plaintiffs Bobby Len Franklin, Robert Lee Franklin and Donna Sue Owens.

June 8, 2004. LANCE S. WILSON, CLERK
s/ _____
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

FRANKLIN, et al.,
Plaintiffs,
vs.
UNITED STATES, et al.,
Defendants.
No. CV-S-04-0128-RLH-(PAL)
ORDER* (Motion to Dismiss #10)
ENTERED Jun 9, 2004

Before the Court is Defendants' **Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and (6)** (#10), filed April 29, 2004. The Court has also considered Plaintiffs' Opposition (#12), filed May 12, 2004, and Defendants' Reply (#13), filed May 25,2004. Also before the Court is Plaintiffs' **Motion for Sanctions Pursuant to Fed. R. Civ. P. 11** (#14), filed June 2, 2004. The Court has also considered Defendant's Opposition (#15), filed May 26, 2004, and Plaintiff's Reply (#17), filed June 2, 2004.

BACKGROUND

This is an action in which Plaintiffs seek judicial review of an order of the Interior Board of Land Appeals ("IBLA"), issued December 19, 1996. In 1995, Plaintiff Bobby Len Franklin ("Franklin"), and his father, Plaintiff Robert Lee Franklin ("R. Franklin"), sent letters to Defendant Bureau of Land Management ("BLM") questioning the BLM's 1988 and subsequent 1993 denials of Franklin's request for Desert Land Entry ("DLE"). In response, the Las Vegas District Manager of the BLM sent identical letters, dated October 27, 1995, to both men, with information pertaining to the men's questions, and stating that the BLM was closing the Plaintiffs' files concerning the DLE application as no available appeals procedures remained. Franklin and R. Franklin appealed those letters to the IBLA. The IBLA dismissed the Franklins' appeal on the grounds that the men were attempting to use the October 1995 informational letters to appeal the 1993 denial of Franklin's DLE application, a right Franklin had waived by neglecting to appeal the 1993 denial to the IBLA within 30 days of its issuance. Furthermore, the IBLA found that the letters themselves did not "adversely affect" the men within the meaning of 43 C.F.R. § 4.410(a), and therefore were not appealable. The two men, with Plaintiff Donna Sue Owens ("Owens"), now seek judicial review of the IBLA's 1996 dismissal of their appeal from the 1995 informational letters.

The history of this perpetual case is extensive. On August 8, 1988, Franklin filed a DLE application with the BLM in

an attempt to acquire title to an 80-acre parcel of land near Laughlin, Nevada (the site) from the U.S. government. On October 13, 1988, the BLM denied Franklin's application on the grounds that the property was not subject to disposition under the Desert Land Act because the land was **mineral in character**, and appropriated by mining claims. Franklin timely appealed to the IBLA, and in an order dated August 27, 1990, the IBLA **reversed the decision** and remanded the issue so that the BLM could survey the land to determine whether the site was in fact mineral in nature and therefore whether it was subject to disposition.

Instead of waiting for the BLM's decision on remand, Franklin filed action in Federal Court on May 6, 1991. This Court dismissed the action on August 29, 1991 for improper service of process, failure to exhaust administrative remedies under the Administrative Procedures Act, failure to name the United States as a proper defendant under the Federal Torts Claims Act, 26 U.S.C. §§2671, *et seq.*, and failure to provide adequate notice regarding the facts that Franklin believed supported his complaint. Franklin appealed the dismissal to the Ninth Circuit,

which affirmed on the service of process issue. *Franklin v. Clark County Manager's Office, et al.*, 967 F.2d 586 (9th Cir. 1992) (unpublished disposition). Subsequently Franklin filed a Petition for Writ of Certiorari to the United States Supreme Court, which was denied. *Franklin v. Clark County Manager's Office, et al.*, 508 U.S. 916 (1993).

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rejection of his DLE application. Franklin had 30 days to appeal the decision to the IBLA. He did not do so.

Instead of appealing to the IBLA, Franklin filed another suit in Federal Court November 22, 1993, this time seeking to quiet title to the site. On May 16, 1994, this Court granted the United States' motion to dismiss for lack of subject matter jurisdiction, on the grounds that Franklin had failed to exhaust his administrative remedies by neglecting to file an appeal of the BLM's final decision with the IBLA.

Franklin appealed the District Court's dismissal to the Ninth Circuit, which again affirmed the dismissal. *Franklin v. United States*, 46 F.3d 1140 (9th Cir. 1995) (unpublished disposition). Again, Franklin filed a Petition for Writ of Certiorari to the United States Supreme Court, which was denied. *Franklin v. United States*, 516 U.S. 829 (1995).

In 1995, Franklin enclosed a portion of the site with a chain link fence and began occupying the site. The BLM advised Franklin that the use was unauthorized and requested that he leave. Franklin refused to do so. The United States instituted a trespass action against Franklin. Franklin counter-sued asserting that he owned the property. On October 14, 1997, this Court enjoined Franklin from any further trespass on the property. The District Court dismissed Franklin's counter-claim for lack of subject matter jurisdiction for the same reason it had done so in 1994.

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Later in 1997, Franklin filed yet another suit in Federal Court, which was again dismissed for lack of subject matter jurisdiction. Again, Franklin appealed to the Ninth Circuit, which again affirmed the District Court's dismissal. *Franklin v. Bilbray*, 172 F.3d 56 (9th Cir. 1999) (unpublished disposition). Franklin again filed a Petition for Writ of Certiorari to the United States Supreme Court, which was again denied. *Franklin v. Bilbray*, 528 U.S. 863 (1999).

Franklin joins with new Plaintiffs, R. Franklin and Owens, seeking this Court's review of issues arising from the

rejection of Franklin's DLE application for the fifth time, this time seeking review of the IBLA's 1996 dismissal for lack of jurisdiction of Franklin and R. Franklin's appeal from the informational letters from BLM.

DISCUSSION

The Court finds that, for a variety of reasons, Defendants' motion to dismiss should be granted. First, this Court lacks subject matter jurisdiction to hear this claim. Second, even if this Court's jurisdiction was proper, the applicable statute of limitations has run and this claim is effectively barred. Third, the doctrine of claim preclusion prevents plaintiffs from bringing this claim. Finally, there is an alleged lack of standing, but because the aforementioned reasons require this Court to dismiss the action, standing will not be addressed.

As a preliminary issue, because Plaintiffs appear *pro se*, this Court has liberally construed Plaintiffs' pleadings, in accordance with *Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir. 1987) (citing *Boag v. MacDougall*, 454 U.S. 364 (1982).

A. Motion to Dismiss

i. Legal Standard

Rule 12(b)(1) of the Fed. R. Civ. P. provides that a court may dismiss a complaint for, "lack of jurisdiction over the subject matter." "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Fed. R. Civ. P. 12(h)(3).

Rule 12(b)(6) of Fed. R. Civ. P. provides that a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also Yamaguchi v. U.S. Dept. of the Air Force*, 109 F.3d 1475, 1481 (9th Cir. 1997). All factual allegations set forth in the complaint "are

taken as true and construed in the light most favorable to [p]laintiffs." *Epstein v. Washington Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1999). Dismissal is appropriate "only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *see also McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988).

ii. Subject Matter Jurisdiction

Plaintiffs seek this Court's review of the IBLA's 1996 dismissal of an appeal from a 1995 informational letter from BLM to Plaintiffs Franklin and R. Franklin. Plaintiffs contend that subject matter jurisdiction exists because Plaintiffs appealed the 1995 letter to the IBLA, and therefore the IBLA's decision is final and this Court may review the decision per 43 C.F.R. § 4.21. Because the letters in question, however, contained only information pertaining to the rejection of Franklin's DLE application, it is evident that the 1996 appeal to the IBLA was actually an appeal of the 1993 rejection of the DLE application.

The Department of Interior requires a party to exhaust its administrative remedies before a District Court may properly assume jurisdiction. *Doria Mining and Eng'g Corp. v. Morton*, 608 F.2d 1255, 1257 (9th Cir. 1979)(citing 43 C.F.R. § 4.21(b)). Administrative remedies regarding Department of Interior decisions are exhausted only upon disposition of an appeal by the IBLA. *Id.*

This Court lacks jurisdiction to hear this case for the same reason it lacked jurisdiction to hear Franklin's four previous claims arising from the rejection of his DLE application. Franklin

failed to appeal the 1993 rejection of his application to the IBLA within thirty days of its issuance and therefore he has failed to exhaust his administrative remedies. As such, this Court lacks jurisdiction to hear this claim.

iii. Statute of Limitations

Even assuming, *arguendo*, that this Court has jurisdiction to hear the claim, the claim is barred by the six year statute of limitations. The Administrative Procedures Act, 5 U.S.C. §§ 701-706 (APA), under which the current claim is brought, does not specify a particular statute of limitations. It is therefore fitting to apply 28 U.S.C. § 2401 to claims filed pursuant to the APA. *Sierra Club v. Penfold*, 857 F.2d 1307, 1315 (9th Cir. 1998). 28 U.S.C. § 2401 provides, "Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the cause of action first accrues." Under the APA, a cause of action accrues from the date final agency action is taken, or the date from which all administrative remedies are exhausted. *Spannus v. United States Dept. of Justice*, 824 F.2d 52, 56 (D.C. Cir. 1987).

To constitute a final agency action, the action "must mark the consummation of the agency's decision-making process – it must not be of a merely tentative or interlocutory nature." *Bennet v. Spear*, 520 U.S. 154, 177-8 (1997) (citing *Chicago and southern Airlines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)). Furthermore, "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* (citing *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget, Transatlantic*, 400 U.S. 62 (1970)). Finally, an administrative decision is final if a party has failed to file a notice of appeal within the requisite time period. *Taylor v. Heckler*, 765 F.2d 872, 876-77 (9th Cir. 1985).

Accordingly, Franklin's cause of action accrued in 1993 when the BLM denied his DLE application on remand because the decision was the consummation of the agency's decision making process in that absent further appeal to the IBLA by Franklin, the BLM would take no further action, and the decision would stand as final. The decision also had legal consequences which included denying Franklin title to the land which later resulted in a trespass action against

Franklin. Finally, Franklin's failure to appeal the 1993 rejection to the IBLA within the 30 day window following the rejection also resulted in the rejection becoming final agency action. Given that the cause of action accrued in 1993, it is clear that the six year statute of limitations has run and therefore Plaintiffs are barred from bringing this claim.[1]

Claim Preclusion

Claim preclusion bars "any lawsuits on any claims that were or could have been raised in a prior action." *Stewart v. U.S. Buncorp*, 297 F.3d 953, 956 (9th Cir. 2002) (emphasis omitted). "Claim preclusion applies if there is (1) an identity of claims; (2) a final judgment on the merits; and (3) identity or privity between the parties." *Providence Health Plan v. McDowell*, 362 F.3d 1243, 1249 (9th Cir. 2004) (quoting *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001).

> In determining whether the prior litigation involved the same claim, we consider four questions: (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement on the same right; and (4) whether the two suits arise out of the same transaction nucleus of facts. The fourth question is most important.

Gospel Missions of America v. City of Los Angeles, 328 F.3d 548, 555 (9th Cir. 2003). Claim preclusion also applies to final administrative decisions and the same general rules apply to administrative decisions as apply to judicial decisions. *Taylor*, 765 F.2d 876-77.

[1] Even if the cause of action accrued upon the IBLA's dismissal of Franklin's appeal in 1996, the statute of limitations has nevertheless run.

Claim preclusion bars Plaintiffs from bringing this action because all three requirements for claim preclusion are met.

Identity of Claims: The transactional nucleus of facts out of which this claim arises is the same as that which gave rise to Franklin's previous proceedings. The transactional nucleus of facts giving rise to these actions has consistently been the BLM's rejection of Franklin's DLE application.

7

Final Judgment on the Merits: When Franklin failed to appeal the BLM's 1993 decision rejecting his application, the decision on the merits became final. Furthermore, the Court's decision in the United States trespass action against Franklin is also a final decision on the merits because it necessarily found that Franklin did not own the property. Franklin appealed this decision and the Ninth Circuit affirmed, meaning that decision is also final.

Privity Among Parties: "Privity may exist if there is substantial identity between parties, that is, there is sufficient commonality of interest." *Gospel Missions*, 328 F.3d at 556. Plaintiffs R. Franklin and Owens now assert an interest in the site because Plaintiff Franklin entered into a contract for sale with R. Franklin and Owens for portions of the site. R. Franklin and Owens' interests in the site are derivative of Franklin's interest, and all parties share the same interest in establishing validity of title. Furthermore, had Franklin been successful in establishing title in any of his previous claims, R. Franklin and Owens' claims would be moot because the contracts for sale were executed in 2002, many years after Franklin's failed attempts to establish ownership of the site.

Accordingly, all the elements of claim preclusion have been met, and Plaintiffs are barred from re-litigating this action.

iv. Standing

Because the Court finds it necessary to grant Defendants' motion to dismiss for the reasons discussed *supra*, the Court finds it unnecessary to address the issue of standing.

B. Motion for Sanctions

Plaintiffs' motion for sanctions is predicated on the notion that Defendants' motion to dismiss was made fraudulently. As this Court has seen fit to grant Defendants' motion to dismiss, the Court obviously does not agree that the motion was fraudulent. Accordingly, the Plaintiffs' motion for sanctions is denied.

CONCLUSION

Accordingly, and for good cause appearing,

8

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and (6) (#10) is GRANTED. Plaintiffs' Motion for Sanctions pursuant to Fed. R. Civ. P. 11 is DENIED.

Dated: June 7, 2004

s/ROGER L. HUNT
United States District Judge

9

From the U.S. Code Online via GPO Access [wais.access.gpo.gov]
[Laws in effect as of January 7, 2003]
[Document not affected by Public Laws enacted between
January 7, 2003 and February 12, 2003]
[**CITE: 28USC1361**]

TITLE 28-JUDICIARY AND JUDICIAL PROCEDURE

PART IV--JURISDICTION AND VENUE

CHAPTER 85--DISTRICT COURTS; JURISDICTION

Sec. 1361. Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

(Added Pub. L. 87-748, Sec. 1(a), Oct. 5, 1962, 76 Stat. 744.)

Section Referred to in Other Sections

This section is referred to in title 18 section 923; title 25 section 2103; title 42 sections 300j-9, 5851, 7622; title 49 section 42121.

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From the U.S. Code Online via GPO Access
[wais.access.gpo.gov]
[Laws in effect as of January 7, 2003]
[Document not affected by Public Laws enacted between January 7, 2003 and February 12, 2003]
[**CITE: 5USC706**]

TITLE 5-GOVERNMENT ORGANIZATION & EMPLOYEES

PART I--THE AGENCIES GENERALLY

CHAPTER 7--JUDICIAL REVIEW

Sec. 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court

shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

Historical and Revision Notes (omitted)

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BOBBY LEN FRANKLIN, et al.,
Petitioners, Plaintiffs,
v.
UNITED STATES, et al.,
Respondents, Defendants

Filed: **2/2/04**, No.: **CV-S-04-0128-RLH-PAL**
COMPLAINT

I. Jurisdiction This is an action to redress the rights secured by and in the Federal Administrative Procedures Act 5 USC § 702 – *Right of review:* … . The final administrative Order for review was certified on 12/19/96, *IBLA 96-111; 96-163*, Desert Land Entries, Motion to Consolidate Granted; Appeals Dismissed. Such IBLA Order is final for the Department of the Interior, for judicial review.

II. Venue

This action properly lies in this Court because the subject property is located in Clark County, Nevada, whereas the Respondents claims a conflicting interest in

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the Plaintiffs Estates.

III. Parties

All parties claim conflicting ownership to the land description of record.

IV. Alleged Violations

1. The Respondents falsely utters that their "Mineral in Character" contest brought under 43 CFR 2520.0-8(a) was not fully adjudicated and finally "*reversed*" in *Franklin*, 116 IBLA 29 (1990), causing Petitioners' Title Insurance Policies to be rejected. The Respondent(s) currently refuses to clear-list the Petitioners property with the county tax assessor,

upon the (above) perpetual lie, insubordinate to his ministerial duty 43 CFR § 1862.6.

2. The final IBLA Order on review mistakenly "rejected" to specifically address the Respondent's unlawful misconduct noted above, thus, has capriciously "Dismissed" the Plaintiffs stare decisis property right pleaded under 43 USCA §1165, 43 CFR §1862.6.

V. Relief

WHEREFORE, the Plaintiffs pray for the following:

1. Hold unlawful and set-aside the Respondent's false decision noted above;

2. Compel the Defendant to clear-list the Plaintiffs real property right with the county assessor, so Plaintiffs can enjoy purchasing title insurance and paying taxes on their recorded titles;

3. Any other relief decided appropriate.

2

[ADMINISTRATIVE REMEDIES EXHAUSTED]

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS

Interior Board of Land Appeals

4015 Wilson Boulevard

Arlington, Virginia 22203

DEC 19, 1996

CERTIFIED

IBLA 96-111,	: N-52292
96-163	: N-49548
	:
BOBBY D. FRANKLIN	: Desert Land Entries
BOBBY L. FRANKLIN	:
	: Motion to Consolidate Granted
	: Appeals Dismissed

ORDER

Bobby D. Franklin and his son Bobby L. Franklin appeal from identical letters dated October 27, 1995, issued by the Las Vegas District Manager, Bureau of Land Management (BLM), responding to questions regarding their desert land entry applications N-52292 and N-49548, filed pursuant to the Desert Land Act, as amended, 43 U.S.C. §§ 321-339 (1994). BLM noted that inasmuch as appellants had exhausted their appeals procedures, which were unsuccessful, it was closing their application files.

On August 8, 1988, Bobby L. Franklin filed his desert land entry application for lands located in the S1/2 of the SE1/4, sec. 16, T. 32 S., R. 66 E., Mount Diablo Meridian. On November 21, 1989, Bobby D. Franklin filed his desert land entry application for the adjacent lands in the N1/2 of the same SE1/4.

Bobby L. Franklin appealed BLM's October 13, 1988, decision rejecting his claim on the basis that "the public lands affected by your DLE [desert land entry] filing N-49548, are appropriated (by mining claims) and thereby rendered unsuitable under the Desert Land Act and not subject to disposition." Under 43 CFR 2520.0-8 (a)(1), in order for lands to be subject to entry under the desert land law, they must be nonmineral in character. In *Bobby L. Franklin*, 116 IBLA 29 (1990), the Board **reversed** BLM's **decision** noting that the mere fact of location of a mining claim does not establish the mineral character of the land. The Board stated that it found no clear evidence in the record to support the conclusion that the land in question was **mineral in character**. Consequently, the Board remanded the case to BLM for reconsideration of Bobby L. Franklin's application and determination of whether the land should be classified as open to desert land entry.

Pursuant to the Board's decision, BLM produced a mineral report dated July 16, 1992, for the **SW1/4** of sec. 16 which found the land embraced by the Franklins'

applications to be mineral in character and therefore not available for appropriation under the Desert Land Act. BLM issued two decisions on November 12, 1993, denying the Franklins' applications based on the findings of the mineral report.

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IBLA 96-111, 96-163

Neither Bobby D. Franklin nor Bobby L. Franklin appealed BLM's decision to this Board. Instead, they instituted action in the Federal district court. Bobby Dean Franklin v. United States, CV-S-93-1203-PMP (LRL) (D. Nev. May 16, 1994); Bobby Len Franklin v. United States, CV-93-01140-PMP. The Government moved to dismiss on the grounds that the Franklins had failed to exhaust their administrative remedies. The court granted the motion stating that when the Franklins received the adverse decisions from BLM, they were required to appeal to the Board. The court found that the Franklins' failure to do so constituted a failure to exhaust their administrative remedies. Therefore, the court concluded that it lacked jurisdiction to hear their appeals.

On appeal to the Ninth Circuit Court of Appeals, the court reviewed the district de novo and affirmed the dismissal for lack of jurisdiction in two memorandum decisions dated January 10, 1995. Bobby L. Franklin v. United States, 46 F.3d 1140 (9th Cir.), cert. denied, 116 S.Ct. 100 (1995); Bobby D. Franklin v. United States, 46 F.3d 1141 (9th Cir.), cert. denied, 116 S.Ct. 123 (1995).

By letters dated October 27, 1995, BLM informed the Franklins that it was closing the files in their desert land entry application cases. The Franklins now appeal the letters. In their statement of reasons, the Franklins assert that the District Manager erred in refusing to issue patents as required by the Confirmation Statute, 43 U.S.C. § 1165 (1994) and 43 CFR 1862.6, the corresponding regulation.

In response, BLM contends that the appeals must be dismissed for lack of jurisdiction. BLM asserts that the Franklins are not "adversely affected" by the letters closing the files within the meaning of 43 CFR 4.410(a), and therefore those letters are not reviewable by the Board. BLM also points out that, to the extent that the appeals include reference to the BLM's 1993 decisions denying there desert land entry claims, the appeals must fail because they were not timely filed. BLM asserts that absent a timely appeal, the Board must dismiss for lack of jurisdiction.

In reply to BLM's response, Bobby L. Franklin essentially reiterates the argument presented in his statement of record for appeal.

On November 4, 1996, the Franklins filed a motion to consolidate their appeals. In light of the fact that the BLM letters dated October 27, 1995, from which these appeals are taken are identical, and the arguments presented on appeal are the same, the motion for consolidation is granted.

The doctrine of administrative finality, like its judicial counterpart res judicata, bars reconsideration of prior actions which were or could have been subject to direct review, in subsequent or collateral proceedings, except upon a showing of compelling legal or equitable reasons. Keith Rush d/b/a Rush's Lakeview Ranch, 125 IBLA 346, 351 (1993) and cases cited. Where an appellant attempts to raise issues that were

finally decided in an earlier decision which was not appealed, the appeal is not timely as to those matters which could have been previously decided. The Wilderness Society, 106 IBLA 46, 53 (1988).

In its decisions dated November 12, 1993, BLM rejected the Franklins' desert land entry applications because the lands embraced by the applications were determined to be mineral in character and therefore not subject to entry as

desert land. If the Franklins wanted to dispute the rejection of their applications, they were required to do so within 30 days of receipt of BLM's decision. See 43 CFR 4.411(a). They did not do so. The timely filing of an appeal is jurisdictional and the failure to file timely mandates dismissal of the appeal. 43 CFR 4.411(c); D. R. Johnson Lumber Co., 106 IBLA 379, 382-83 (1989). The Franklins cannot use BLM's response to its questions concerning desert land entry to overcome their failure to appeal the November 12, 1993, decision.

We note that the Franklins argued before the Ninth Circuit that the district court should have asserted its jurisdiction under the Confirmation Statute, 43 U.S.C. § 1165 (1994), regardless of their failure to exhaust administrative remedies. This statute places a restriction on the power of the Secretary of the Interior to contest an entryman's right to a patent on desert land and assures the entryman of rights to a patent if the Secretary fails to contest the entry within two years. The Ninth Circuit disposed of this argument by stating that the statute does not provide an independent basis for the district court's jurisdiction or excuse a party's failure to exhaust administrative remedies.

To the extent appellants have raised arguments which we have not specifically addressed herein, they have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the motion to consolidate is granted and the appeals are dismissed.

John H. Kelly
Administrative Judge

I concur:
Franklin D. Arness
Administrative Judge

IBLA 96-111, 96-163

APPEARENCES:

Bobby D. Franklin
5036 Royal Avenue
Las Vegas, NV. 89103

Bobby L. Franklin
HC 770, Box 41531
Pahrump, NV. 89041

Frank S. Wilson, Esq.
Assistant Regional Solicitor
U.S. Department of the Interior
2800 Cottage Way, Room E-2753
Sacramento, CA. 95825-1980

United States Department of the Interior
Bureau of Land Management
Las Vegas District Office
4765 Vegas Drive
Las Vegas, Nevada 89108

IN REPLY REFER TO:
N-49548
2520
(NV-050)

CERTIFIED MAIL NO. 2525007
RETURN RECEIPT REQUESTED

DECISION ..... **OCT 27, 1995**

Mr. Bobby L. Franklin
HC 770, Box 41531
Pahrump, NV. 89041

Dear Mr. Franklin:

Thank you for meeting with me over the past few weeks. I appreciate and respect your comments concerning your desert land entry application.

You had questions concerning the "receiver's receipt". This receipt deals with the payment of the balance of the

$1.25 per acre purchase price of the land and is payable at the time that final proof of development to qualify for patent is filed. The $15 filing fee and the $0.25 per acre deposit payable with the filing of the application for entry have no standing to create any rights to receive title to the land described in a desert land entry application. In order for any right to title to the land to vest in the applicant, the **BLM must issue an entry allowed decision**. Even then the right granted must be perfected by developing the land to meet the reclamation requirements of the desert land act. Development must be followed by timely submittal of **final proof** to document that development. As part of the final proof taking, the entryman must pay the balance of the purchase price, which is $1.00 per acre. To acknowledge payment of this balance, the "receiver's receipt" is issued. This is the receipt that triggers the two-year clock to mandate that BLM issue patent, or timely initiate contest of an inadequately developed entry. If contest does not occur timely, then and only then, is the entryman entitled to a patent.

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You submitted "INTERROGATORIES" on your visit of October 16. It is not necessary to answer your request as the decision to reject your application, dated October 25, 1993, was appropriate.

Inasmuch as you have exhausted your appeals procedures, which were unsuccessful, we are closing your application file. If you have any questions, please contact Larry Sip of this office at 647-5063.

Sincerely,
s/Michael F. Dwyer
District Manager

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XXX

Clark County Recorder #20021011.00994
RE-RECORDED

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

RECEIPT AND ACCOUNTING ADVICE

NO. 1329049
NV050-Las Vegas District
August 26, 1988

Subject: Desert Land Entry Filing Fee
Applicant: Bobby L. Franklin
206 Paris Avenue 14 5017
Las Vegas, NV. 89103
Remitter: $35.00

Assignor:

LEASE MANAGEMENT DATA _NEW _UPDATE _PAYMENT

ORIGINAL SERIAL NO.	ASG.	TYPE	ST.
N-49548			

APPLY REMITTANCE

PAID

DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

1

XXX

RE-RECORDED
Clark County Recorder #20021011.00994

DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

PCN: OG080P1
FORM: 1274

CASE ABSTRACT AS OF: **8/27/88**

03-03-1877;019STAT0377;43USC321-
323,325,CASE/TYPE/NO.
DESERT LAND ACT 252000 NVN-49548

NAME AND ADDRESS
FRANKLIN BOBBY L
206 PARIS AVE
LAS VEGAS NV 89109
APPLICANT 100.00000%

DESCRIPTION OF LAND
MOUNT DIABLO MER
T. 32 S R. 66 E CLARK COUNTY, NV
LAS VEGAS DISTRICT STATELINE RESOURCE AREA
SEC. 16: S2SE 80.000 ACRES

ACTIONS

DATE	CODE	TAKEN	REMARKS
8/18/1988	124	APLN RECD	
********	PENDING ACTION: LAS VEGAS DISTRICT		
8/18/1988	347	FILING FEE RECEIVED	$15;
8/18/1888	392	MONIES RECEIVED	$20;

GENERAL REMARKS 01 DLE

RE-RECORDED
Clark County Recorder #20021011.00994

TITLE 43 OF THE CODE OF FEDERAL REGULATION

SECTION 1862.6 - PATENT TO ISSUE AFTER 2 YEARS FROM DATE OF MANAGER'S FINAL RECEIPT.

(A) THE DECISION OF THE SUPREME COURT OF THE UNITED STATES IN THOMAS J. STOCKLEY ET AL., V. UNITED STATES, DECIDED JANUARY 2, 1923 (260 U.S. 532, 67 L.ED. 390) HOLDS THAT AFTER THE LAPSE OF 2 YEARS FROM THE DATE OF THE ISSUANCE OF THE "RECEIVER'S RECEIPT" •UPON THE FINAL ENTRY OF ANY TRACT OF LAND UNDER_THE HOMESTEAD, OR DESERT-LAND LAWS, SUCH ENTRY, ENTITLED TO PATENT UNDER THE PROVISO TO SECTION 7 OF THE ACT OF MARCH 3, 1891 (26 STAT. 1098; 43 U.S.C. 1165), REGARDLESS OF WHETHER OR NOT THE MANAGER'S FINAL CERTIFICATE HAS ISSUED.

(B) THE SUPREME COURT OF THE UNITED STATES IN PAYNE V. U.S. EX REL. NEWTON (255 U.S. 438, L.ED. 720), DECIDED THAT NEWTON WAS ENTITLED TO A PATENT ON IIIS HOMESTEAD ENTRY UNDER THE PROVISO TO SECTION 7 OF THE ACT OF MARCH 3, 1891, 2 YEARS HAVING ELAPSED FROM THE DATE OF THE ISSUANCE OF THE RECEIVER'S FINAL RECEIPT UPON FINAL ENTRY, AND THERE BEING NO CONTEST OR PROTEST PENDING AGAINST THE VALIDITY OF THE ENTRY, BUT STATED THAT THE PURPOSE OF THE STATUTE WAS:

TO REQUIRE THAT THE RIGHT TO A PATENT WHICH FOR 2 YEARS HAS BEEN EVIDENCED BY A RECEIVER'S RECEIPT, AND AT THE END OF THAT PERIOD STANDS UNCHALLENGED, SHALL BE RECOGNIZED AND GIVEN EFFECT BY THE ISSUE OF THE PATENT WITHOUT FURTHER WAITING AND

DELAY, AND THUS TO TRANSFER FROM THE LAND OFFICERS TO THE REGULAR JUDICIAL TRIBUNALS THE AUTHORITY TO DEAL WITH SUBSEQUENT CONTROVERSY OVER THE VALIDITY OF THE ENTRY, AS WOULD BE THE CASE IF THE PATENT WERE ISSUED IN THE ABSENCE OF THE STATUTE.

• THE RECEIPTS FORMALY ISSUED BY THE RECEIVERS ARE NOW ISSUED BY THE MANAGER.

AMENDMENT V TO THE U.S. CONSTITUTION

NO PERSON SHALL BE HELD TO ANSWER FOR A CAPITAL, OR OTHERWISE INFAMOUS CRIME, UNLESS ON A PRESENTATION OR INDICTMENT OF A GRAND JURY, EXCEPT IN CASES ARISING IN THE LAND OR NAVAL FORCES, OR IN THE MILITIA, WHEN ACTUAL SERVICE IN TIME OF WAR OR PUBLIC DANGER; NOR SHALL ANY PERSON BE SUBJECT FOR THE SAME OFFENCE TO BE TWICE PUT INTO JEOPARDY OF LIFE OR LIMB; NOR SHALL BE COMPELLED IN ANY CRIMINAL CASE TO BE A WITNESS AGAINST HIMSELF, NOR BE DEPRIVED OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR SHALL PRIVATE PROPERTY BE TAKEN FOR PUBLIC USE, WITHOUT JUST COMPENSATION.

From the U.S. Code Online via GPO Access
[wais.access.gpo.gov]
[Laws in effect as of January 7, 2003]
[Document not affected by Public Laws enacted between
January 7, 2003 and February 12, 2003]
[CITE: 43USC1165]

TITLE 43--PUBLIC LANDS

CHAPTER 28--MISCELLANEOUS PROVISIONS RELATING TO PUBLIC LANDS

SUBCHAPTER II--DISPOSITION OF SUSPENDED ENTRIES AND CLAIMS; INVALID AND DEFECTIVE CLAIMS AND PATENTS THEREFOR

Sec. 1165. Suspension of entries for correction of clerical errors; patents

Whenever it shall appear to the Secretary of the Interior, or such officer as he may designate, that a clerical error has been committed in the entry of any of the public lands such entry may be suspended, upon proper notification to the claimant, through the local land office, until the error has been corrected; and all entries made under the preemption, homestead, desert-land, or timber-culture laws, in which final proof and payment may have been made and certificates issued, and to which there are no adverse claims originating prior to final entry and which have been sold or incumbered prior to the 1st day of March, 1888, and after final entry, to bona fide purchasers, or incumbrancers, for a valuable consideration, shall unless upon an investigation by a Government agent, fraud on the part of the purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the Land Department of such sale or incumbrance: Provided, That after the lapse of two years from the date of the issuance of the receipt of such officer as the Secretary of the Interior may designate upon the final entry of any tract of land

under the homestead, timber-culture, desert-land, or preemption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor.

(Mar. 3, 1891, ch. 561, Sec. 7, 26 Stat. 1098; Oct. 28, 1921, ch. 114, Sec. 1, 42 Stat. 208; Mar. 3, 1925, ch. 462, 43 Stat. 1145; 1946 Reorg. Plan No. 3, Sec. 403, eff. July 16, 1946, 11 F.R. 7876, 60 Stat. 1100.)

References in Text

This act, referred to in text, means act Mar. 3, 1891, ch. 561, 26 Stat. 1095, as amended, which enacted sections 161, 162, 173, 174, 185, 202, 212, 321, 323, 325, 327 to 329, 663, 671, 687a-6, 718, 728, 732, 893, 946 to 949, 989, 1165, 1166, 1181, and 1197 of this title, sections 471, 607, 611, 611a, and 613 of Title 16, Conservation, section 495 of Title 25, Indians, and sections 30, 36, 44, 45, 48, and 52 of Title 30, Mineral Lands and Mining. For complete classification of this Act to the Code, see Tables.

Codification

Section was formerly classified to section 165 of this title.

Repeals

Repeal of ``Act to encourage the growth of timber on the western prairies'' not to affect valid rights accrued or accruing under said law and claims to be perfected in same manner as if act had not been repealed, see section 1181 of this title.

Transfer of Functions

For transfer of functions of other officers, employees, and agencies of Department of the Interior, with certain exceptions, to Secretary of the Interior, with power to delegate, see Reorg. Plan No. 3 of 1950, Secs. 1, 2, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1262, set out under section 1451 of this title.

``Secretary of the Interior, or such officer as he may designate'' and ``receipt of such officer as the Secretary of the Interior may designate'' substituted for ``Commissioner of the General Land Office'' and ``register's receipt'', respectively, on authority of section 403 of Reorg. Plan No. 3 of 1946. See note set out under section 1 of this title.

U.S. Supreme Court

STOCKLEY v. U S, 260 U.S. 532 (1923)

260 U.S. 532

STOCKLEY et al.
v.
UNITED STATES.
No. 74.

Argued Nov. 20, 1922.
Decided Jan. 2, 1923.

[260 U.S. 532, 533] Mr. S. L. Herold, of Shreveport, La., for appellants.

Mr. Assistant Attorney General Riter, for the United States.

[260 U.S. 532, 536]

Mr. Justice SUTHERLAND delivered the opinion of the Court.

This is a suit in equity brought by the United States, as plaintiff, against the appellants, as defendants, by which a decree was sought adjudging the plaintiff to be the owner of a tract of land in the parish of Caddo, La., enjoining all interference therewith, and requiring the defendants to account for the value of oil and gas extracted by them therefrom.

The United States District Court for the Western District of Louisiana, upon the report of a master, found for the plaintiff and entered a decree in accordance with the prayer of the bill ordering a restoration of possession and awarding damages against some of the defendants, including Stockley, for about

$62,000.

The case comes to this court by appeal from the decree of the Circuit Court of Appeals affirming the decree of the District Court. 271 Fed. 632.

The defendants denied plaintiff's title and alleged that the land was the property of the defendant Stockley by virtue of his compliance with the homestead laws of the United States.

The conceded facts are that in 1897 Stockley took possession of the land and on November 13, 1905, made a preliminary entry thereof as a homestead. He complied with the provisions of the homestead laws, submitted final proof, including the required nonmineral affidavit, paid the commissions and fees then due, and on January 16, 1909, obtained the receiver's receipt therefor. Prior to that time, viz. on December 15, 1908, a large body of public lands, embracing within its boundaries the land in question, was withdrawn by an order of the President of the United States from all forms of appropriation. The withdrawal order was expressly made 'subject to existing valid claims.' The receiver receipt, omitting unnecessary matter, is in the following words: [260 U.S. 532, 537] 'Received of Thomas J. Stockley ... the sum of three dollars and one cent in connection with Hd. Final, Serial 0188 for [lands described] 71.25 acres. ...'

On March 17, 1910, Stockley leased the property in question to the defendant the Gulf Refining Company, which company subsequently drilled wells and developed oil. The rights of the other defendants are wholly dependent upon the title asserted on behalf of Stockley.

On July 16, 1910, after the report of a special agent confirming Stockley's claim of residence upon and cultivation and improvement of the lands, the Commissioner of the General Land Office ordered the case 'clear- listed and closed as to the Field Service Division.' Subsequently, and more than three years after the issuance of the receiver's receipt, viz. on February 27, 1912, a contest was ordered by the Commissioner of the General Land Office before the local register and receiver upon the charge that the land was mineral in character, being chiefly valuable for oil and gas, and that when Stockley made his final proof he knew or, as an ordinarily prudent man, should have known this fact. After a hearing, the register and receiver decided in favor of Stockley, but the Commissioner of the General Land Office reversed the decision and ordered the entry canceled. The Secretary of the Interior affirmed the Commissioner, with a modification allowing Stockley to obtain a patent for the surface only, under the provisions of the Act of July 17, 1914, c. 142, 38 Stat. 509 (Comp. St 4640a-4640c).

The defendants contended that the Commissioner of the General Land Office and the Secretary of the Interior were without authority to entertain this contest because prior thereto full equitable title had vested in Stockley and he had become entitled to a patent by virtue of the provisions of section 7 of the Act of March 3, 1891, c. 561, 26 Stat. 1095, 1099 (Comp. St. 5113). That section, so far as necessary to be stated, provides: [260 U.S. 532, 538] 'That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber culture, desert land, or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from

the date of said entry before the issuing of a patent therefor.'

The court below rejected defendants' contention, holding that the receipt issued to Stockley was not a 'receiver's receipt upon the final entry' for the reason that, in the view of that court, a final entry could not become effective until the issuance of the certificate of the register. In other words, it was the opinion of the lower court that in order to constitute a final entry within the meaning of the statute above quoted, there must be an adjudication upon the proofs and the issuance of a final certificate, evidencing an approval thereof.

We think the language of the statute does not justify this conclusion. It must be assumed that Congress was familiar with the operations and practice of the Land Department and knew the difference between a receiver's receipt and a register's certificate. These papers serve different purposes. One, as its name imports, acknowledges the receipt of the money paid. The other certifies to the payment and declares that the claimant on presentation of the certificate to the Commissioner of the General Land Office shall be entitled to a patent.

The evidence shows that prior to the passage of the statute, and thereafter until 1908, the practice was to issue receipt and certificate simultaneously upon the submission and acceptance of the final proof and payment of the fees and commissions. In 1908 this practice was changed, so that the receipt was issued u on the submission [260 U S. 532, 539] of the final proof and making of payment, while the certificate was issued upon approval of the proof and this might be at any time after the issuance of the receipt. The receiver and register act independently, the former alone being authorized to issue the receipt and the latter to sign the certificate. The receipt issued to Stockley was after submission of his proof and payment of all that he was required to pay under the law. No certificate was ever issued

by the register.

It is contended by the government that the receiver's receipt named in the statute should be restricted to a receipt issued simultaneously with the register's certificate after approval of final proofs, and that, after the change of 1908 in the practice of the department, a receipt issued before such approval does not come within the meaning of the statute. Such a receipt, it is contended, obtains no validity as a 'receiver's receipt upon the final entry' until after the proof has in fact been examined and approved.

We cannot accept this conception of the law. A change in the practice of the Land Department manifestly could not have the effect of altering the meaning of an act of Congress. What the act meant upon its passage, it continued to mean thereafter. The plain provision is that the period of limitation shall begin to run from the date of the 'issuance of the receiver's receipt upon the final entry.' There is no ambiguity in this language and, therefore, no room for construction. There is nothing to construe. The sole inquiry is whether the receipt issued to Stockley falls within the words of the statute. In Chotard v. Pope, 12 Wheat. 586, 588 (6 L. Ed. 737), this court defined the term entry as meaning:

> 'That act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country, by filing his claim in the office of an officer known in the legislation of several states by the epithet of an entrytaker, and corresponding [260 U.S. 532, 540] very much in his functions with the registers of land offices, under the acts of the United States.'

It was in this sense that the term 'final entry' was used in this statute. Having submitted to the proper officials proof showing full compliance with the law, and having paid all the

fees and commissions lawfully due, Stockley had done everything which the law required on his part and became entitled to the immediate issuance of the receiver's receipt, and this receipt was issued and delivered to him. No subsequent receipt was contemplated or required. From the date of the receipt the entry may be held open for the period of two years, during which time its validity may be contested. Thereafter the entryman is entitled to a patent and the express command of the statute is that 'the same shall be issued to him.' Lane v. Hoglund, 244 U.S. 174, 37 Sup. Ct. 558; Payne v. United States ex rel. Newton, 255 U.S. 438, 41 Sup. Ct. 368.

That Stockley's acts constituted final entry is borne out by rulings of the Land Department. Thus in Gilbert v. Spearing, 4 Land Dec. 463, 466, Secretary Lamar said:

> 'When the homestead application, affidavit and legal fees are properly placed in the hands of the local land officers, and the land applied for is properly subject to entry, from that moment the right of entry is complete and in contemplation of law the land is entered.'

See, also, Iddings v. Burns, 8 Land Dec. 224, 226.

We are not at liberty to add to or take from the language of the statute. When Congress has plainly described the instrument from whose date the statute beings to run as the 'receipt upon the final entry,' there is no warrant for construing it to mean only a receipt issued simultaneously with the certificate or one issued after the adjudication on the final proof, which might be-and in this instance was-postponed indefinitely. It was to avoid just such delays for an unreasonable length of time-that is, for more than two years-that the statu e was enacted. Lane v. Hoglund, supra, and Land Department [260 U.S 532, 541] decisions cited. The purpose and effect of the statute are clearly and accurately

stated by the Commissioner of the General Land Office in Instructions of June 4, 1914, 43 Land Dec. 322, 323, in the course of which it is said:

> 'There is no doubt that Congress chose the date of the receiver's receipt rather than of the certificate of the register as controlling, for the reason that payment by the claimant marks the end of compliance by him with the requirements of law. It would be manifestly unjust to make the right to a patent dependent upon the administrative action of the register, subjecting it to such delays as are incident to the conduct of public business and over which the claimant has no control. Payment, of which the receiver's receipt is but evidence, is, therefore, the material circumstance that starts the running of the statute, inasmuch as a claimant is and always has been entitled to a receipt when payment is made.'

It is urged, however, that in any event the receiver exceeded his authority in issuing the receipt, since the Commissioner of the General Land Office, on December 15, 1908, had instructed the register and receiver, among other things, as follows:

> 'Applications, selections, entries, and proofs based upon selections, settlements, or rights initiated prior to the date of withdrawal may be received by you and allowed to proceed under the rules up to and including the submission of final proofs. You must not, however, in such cases receive the purchase money or issue final certificate of entry, but must suspend the entries and proofs pending investigation as to the validity of the claims with regard to the character of the land and compliance with the law in other respects.'

These instructions were issued, as shown upon their face, in view of the presidential withdrawal order of the same date. We suggest, without deciding, that, inasmuch as the withdrawal order was expressly made subject to [260 U.S. 532, 542] existing valid claims, and Stockley's claim was obviously existing and valid, this instruction of the Commissioner was itself without authority, since, as applied to Stockley, it was in conflict with the withdrawal order. This has nothing to do with the question as to whether the lands were, in fact, mineral in character, which is another and different matter dealt with later. However, Stockley, as already shown, did, in act, make final entry and the receiver did, in fact, issue and deliver his receipt thereon. The case, therefore, falls within the terms of the statute and must be governed by it, unless the receipt be held for naught on the ground that it was issued contrary to the Commissioner's instruction. But the very object of the statute was to preclude inquiry upon that or any other matter, except as provided by the statute, after the expiration of two years from the date of the receiver's receipt. In United States v. Winona & St. Peter Railroad Co., 165 U.S. 463, 476, 17 S. Sup. Ct. 368, 371 (41 L. Ed. 789) this court had under consideration section 8 of the same act (26 Stat. 1099 [Comp. St. 5114]), limiting the time within which suits by the United States might be brought to annul patents. That section, it was said, recognizes:

> 'That when its proper officers, acting in the ordinary course of their duties, have conveyed away lands which belonged to the government, such conveyances should, after the lapse of a prescribed time, be conclusive against the government, and this notwithstanding any errors, irregularities or improper action of its officers therein.'

It was said further:

> 'Under the benign influence of this statute it would matter not what the mistake or error of the Land Department was, what the frauds and misrepresentations of the patentee were, the patent would become conclusive as a transfer of the title, providing only that the land was public land of the United States and open to sale and conveyance through the Land Department.'

In United ates v. Chandler-Dunbar Water Power Co., 209 U.S. 447, 450, 28 S. Sup. Ct. 579, 580 (52 L. Ed. 881), this section of the act was again under [260 U.S. 532, 543] consideration. A patent was attacked as void for the alleged reason that the land which it purported to convey had been reserved for public purposes, and upon that ground the application of the statute was denied, but this court said:

> 'It is said that the instrument was void and hence was no patent. But the statute presupposes an instrument that might be declared void. When it refers to 'any patent heretofore issued,' it describes the purport and source of the document, not its legal effect. If the act were confined to valid patents it would be almost or quite without use.'

To hold that the receipt here under consideration falls outside the terms of the statute would be to defeat the purpose of the statute and perpetuate the mischief which it sought to destroy. Prior to the decision in the case of Jacob A. Harris, 42 Land Dec. 611, 614 (quoted with approval in Lane v. Hoglund, supra), it had been held that the statute did not affect the conduct or action of the Land Department in taking up and disposing of final proof of entrymen after the lapse of the two-year period (Mertie C. Traganza, 40 Land. Dec. 300),

but this view was sharply challenged and overruled in the Harris Case, where it was said:

> 'Passed, primarily, to rectify a past and to prevent future abuses of the departmental power to suspend entries, the proviso is robbed of its essential purpose and practically repleaded by the decision in the Traganza Case.'

The effective character of the receiver's receipt being established, the question, after the lapse of the two-year period, as to whether the land was mineral bearing, was no longer open. Inquiry upon that ground was then foreclosed, along with all others. Payne v. United States ex. rel. Newton, supra.

The bar of the statute likewise prevails, notwithstanding the executive withdrawal of December 15, 1908. The validity of that order is, of course, settled by the decision [260 U.S. 532, 544] in United States v. Midwest Oil Co., 236 U.S. 459, 35 Sup. Ct. 309, but, as already stated, there is excepted from the operation of the order 'existing valid claims.' Obviously this means something less than a vested right, such as would follow from a completed final entry, since such a right would require no exception to insure its preservation. The purpose of the exception evidently was to save from the operation of the order claims which had been lawfully initiated and which, upon full compliance with the land laws, would ripen into a title. The effect of a preliminary homestead entry is to confer upon the entryman an exclusive right of possession, which continues so long as the entryman complies in good faith with the requirements of the homestead law. Stearns v. United States, 152 Fed. 900, 906, 82 C. C. A. 48; Peyton v. Desmond, 129 Fed. 1, 12, 63 C. C. A. 651. Since it is conceded that Stockley made such an entry in 1905 and his compliance with the requirements of the homestead law prior to the withdrawal order is not questioned, it follows that he

had, when that order was issued, an existing valid claim, within the meaning of the exception. The action of the Commissioner of the General Land Office, therefore, in directing a contest against Stockley's entry three years after the issuance to him of the receiver's receipt was unauthorized and void.

The decree of the Circuit Court of Appeals is reversed, and the cause remanded to the District Court, with directions to dismiss the bill of complaint.

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